SECOND DIVISION
September 26, 2017

No. 1-16-2450

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GREGORY HILTON and NOETIC HEALTH SERVICES, LLC.,	)	Appeal from the Circuit Court of
Plaintiffs-Appellants,	)	Cook County
v.	)	No. 2010 L 010174
FOLEY & LARDNER, LLP, MICHAEL S. BAIG, MICHAEL S. SHAPIRO and CHARLES P. SHEETS,	)	Honorable James E. Snyder, Judge Presiding.
Defendants-Appellees.	)	

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Neville and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Judgment in defendants' favor affirmed given that the individual plaintiff's claims were time-barred because they arose out of defendants' rendering of professional services and were not filed within two years of the date plaintiff knew of his injury and its wrongful cause; the LLC plaintiff's professional negligence claim was properly resolved on summary judgment because as a matter of law, there was no proximate relationship between the claimed damages and the alleged malpractice.

¶ 2 Gregory Hilton and Noetic Health Services, LLC, a limited liability company in which Hilton is a minority member, sued Foley & Lardner, LLP, and several of its lawyers for a variety of claims arising out of underlying litigation between Hilton and

Noetic's majority and managing member, Shirlee Dwyer, in which Foley represented Noetic and Dwyer. The trial court dismissed certain claims and requests for relief and ultimately granted defendants' motion for summary judgment on the remaining claims. Plaintiffs appeal the dismissal of a claim for conversion and summary judgment rulings on Hilton's claim against defendants for aiding and abetting Dwyer's breach of fiduciary duty and on Noetic's claim against defendants for legal malpractice. We affirm.

¶ 3 Noetic was a short-lived entity that was formed in December 2002 and dissolved at the end of 2004. Dwyer and Hilton were, respectively, majority (51%) and minority (49%) members of Noetic, and Dwyer acted as Noetic's manager. As far as the record reveals, Noetic provided management services for one customer, Paladin, LLC, a physician-owned entity that provided mental health services primarily to Medicare and Medicaid patients. Dwyer and Hilton were also involved in Paladin's operations, with Hilton alleging that he advanced, either through Noetic or directly, more than $260,000 to Paladin to cover cash flow shortages caused by the delay between the provision of services to patients and reimbursement from Medicare and Medicaid. The parties also reference that Noetic served as Paladin's manager.

¶ 4 After Noetic was dissolved at the end of 2004, Hilton demanded an accounting and access to Noetic's books and records. At that time, Noetic had approximately $200,000 in cash.

¶ 5 During 2005, Dwyer commissioned two accountings, at Noetic's expense, both of which determined that Hilton was owed a substantial portion of Noetic's cash on hand. Dwyer disagreed with the results of these accountings, believing that they did not accurately reflect inter-entity transactions between Noetic and Paladin. According to

Dwyer's emails, she also believed Hilton had improperly used various bank accounts for non-business purposes. Dwyer retained counsel (but not Foley) while the second accounting was being prepared, although Charles Sheets, a Foley partner who knew Dwyer from previous business dealings, was copied on certain email correspondence. In an August 26, 2005 email on which Sheets was copied, Dwyer stated, "I would rather spend the money on legal fees than see [Hilton] get the money."

¶ 6 Foley agreed to take over Dwyer's representation in November 2005. Given Dwyer's dissatisfaction with the results of the previous accountings, Foley hired a third accountant, Bruce Abrams, in December 2005. Abrams was unable to complete the accounting due to a family emergency. Foley then retained accountant Joseph Modica, who concluded that depending on whether Paladin and Noetic were treated separately or together, either Noetic owed Hilton money or vice versa.

¶ 7 In the meantime, on January 27, 2006, when Dwyer failed to accede to his demands, Hilton sued both Noetic and Dwyer in the circuit court of Cook County. Foley filed an appearance for both Dwyer, as Noetic's managing member, and Noetic.

¶ 8 Sometime after July 2006, after Modica's findings were received, Sheets urged Dwyer to distribute Noetic's remaining assets according to Modica's accounting, but she refused. Dwyer also refused to pursue a settlement with Hilton. In January 2007, Sheets informed Dwyer that he thought Hilton should receive 49% of Noetic's assets.

¶ 9 By late 2006, Hilton, himself a lawyer, believed that Foley's representation of both Dwyer and Noetic gave rise to a conflict in that it was in Noetic's interest to expeditiously distribute its assets, while Dwyer's goal was to dissipate those assets and avoid paying anything to Hilton. Hilton raised this issue with his attorney, Arthur Ellis,

who wrote to Foley on April 5, 2007, raising the claimed conflict. In the letter, Ellis stated that "Noetic's sole interest as of [the end of 2004] was to complete the agreed upon dissolution and pay out the value of each of its member's capital account." Ellis also cited the August 2005 email from Dwyer to Sheets in which Dwyer said she would rather use Noetic's funds for attorney's fees than use them to pay Hilton, which he interpreted as indicating that Dwyer's purpose was to guarantee that Hilton "would not receive a penny from Noetic." Sheets responded to Ellis's letter on April 27, 2007, and denied that Foley's dual representation of Dwyer and Noetic gave rise to a conflict, but invited Ellis to file a motion to disqualify if he believed a conflict existed. Sheets expressed a willingness to discuss settlement, but noted that "with every motion and amended complaint we are forced to respond to, the available funds for such a settlement decreases." Upon receiving a copy of Sheets' response, Hilton wondered whether Sheets had ever read the Rules of Professional Conduct.

¶ 10 Hilton never moved to disqualify Foley in the underlying case. Further, although Hilton believed Foley's defense of the case was a "subterfuge" designed solely to spend down Noetic's assets, he never sought Rule 137 sanctions against Dwyer or Foley.

¶ 11 Foley withdrew from the representation of Dwyer and Noetic in September 2008. By that time, Foley had been paid approximately $150,000 in attorney fees, substantially depleting Noetic's assets.

¶ 12 Shortly after Foley's withdrawal, Dwyer hired new counsel for herself and separate counsel for Noetic. She reached a settlement with Hilton memorialized in a stipulation signed on September 30, 2008. In the stipulation, Dwyer admitted that she had breached her fiduciary duties to Hilton by using Noetic's assets to pay her lawyers and

that she did so "in reliance on the counsel, direction and aid of her attorneys." Dwyer stipulated that she was indebted to Hilton in the amount of $162,976.03, which she agreed represented Hilton's share of Noetic's assets as they existed at dissolution. Hilton agreed not to enforce the judgment against Dwyer and to seek satisfaction from Foley. Upon entry of the settlement, Hilton became Noetic's managing member. Dwyer remained a 51% member.

¶ 13 Hilton and Noetic filed their complaint against Foley and the individual defendants on September 3, 2010. The complaint contained five counts: a claim for conversion by Hilton (Count I), a claim for breach of fiduciary duty premised on Foley's alleged "derivative" fiduciary duty to Hilton as Noetic's minority member (Count II), a claim by Hilton that defendants aided and abetting Dwyer's breach of fiduciary duty to Hilton (Count III), a breach of fiduciary duty claim on behalf of Noetic (Count IV) and a professional negligence claim on behalf of Noetic (Count V). A collection matter filed by Foley against Noetic seeking additional fees was ultimately consolidated with Hilton's case.

¶ 14 On defendants' motion, the trial court dismissed with prejudice certain claims and granted leave to replead others. Hilton's claims under Count I for conversion and Count II for "derivative" breach of fiduciary duty were dismissed with prejudice. Although the court did not accept that those claims were time-barred under 735 ILCS 5/13-214.3 (West 2010) (two-year statute of limitations for claims sounding in "tort, contract, or otherwise *** arising out of an act or omission in the performance of professional services"), the court found that the conversion count failed to state a claim because Hilton did not identify a specific chattel nor did he allege that he made a demand on defendants for

return of the funds. As to Hilton's breach of fiduciary duty claim, the court found as a matter of law that because defendants were representing an adverse party in the underlying litigation, they owed no fiduciary duty to Hilton. The court also dismissed with prejudice Noetic's Count IV claim for breach of fiduciary duty as duplicative of the professional negligence claim in Count V. With respect to Hilton's aiding and abetting claim in Count III and Noetic's professional negligence claim in Count V, the court denied the motion to dismiss as to Foley, but granted it with leave to replead facts supporting claimed conduct on the part of the individual lawyers. The court also granted defendants' motion to strike the prayer for punitive damages as all counts of the complaint arose out of the provision of legal services. 735 ILCS 5/2-1115 (West 2010).

¶ 15 Plaintiffs filed an amended complaint restating the claims that had been dismissed without prejudice and repleading the conversion and the breach of fiduciary duty counts on behalf of Hilton in order to preserve those issues for appeal.

¶ 16 The parties engaged in discovery. Dwyer was never deposed.

¶ 17 On April 14, 2015, the matter was set for a jury trial on December 14, 2015. On October 30, 2015, defendants filed a motion for summary judgment in which they (i) renewed their argument that Hilton's aiding and abetting claim was time-barred and raised other substantive arguments regarding that claim and (ii) argued that Noetic could not satisfy its burden to show any proximate relationship between defendants' conduct and the damages sought. After the motion was fully briefed, plaintiffs filed an emergency motion, two weeks before trial, seeking to file a second amended complaint raising new claims denominated "Conspiracy to Defraud" and "Fraudulent Billing."

¶ 18 The trial date was reset and the trial court ultimately granted defendants' motion for summary judgment on April 15, 2016. Although the court found that there was a "real concern" about the timeliness of Hilton's aiding and abetting claim, its ruling focused on the litigation privilege that applied to defendant's conduct in defending the lawsuit Hilton filed against Dwyer and Noetic. Because Hilton alleged no conduct on defendants' part other than "ordinary attorney representation," the court found defendants were entitled to summary judgment. With respect to Noetic's professional negligence claim, the court agreed that proximate cause was absent given that had Foley not undertaken the representation of Dwyer and Noetic, Dwyer, as managing member, could have hired non-conflicted counsel for herself and Noetic and accomplished the same dissipation of funds that formed the basis of Noetic's damage claim. Leave to file the second amended complaint was denied.

¶ 19 Plaintiffs filed a motion to reconsider the summary judgment ruling on May 16, 2016. The motion alleged, without argument in support, that the court had "misapplied current law." On the same date, defendants requested leave to voluntarily dismiss the collection case and for entry of final judgment. On May 26, 2016, the trial court entered an order dismissing the collection action, entering final judgment on the remaining claims in favor of defendants and denying plaintiffs' motion for reconsideration.

¶ 20 Plaintiffs, through new counsel, filed a second motion for reconsideration on June 13, 2016. In this motion, plaintiffs argued for the first time that (i) the "crime-fraud" exception to the attorney-client privilege should apply to the absolute litigation privilege on which the court relied in granting summary judgment against Hilton the aiding and abetting claim; (ii) defendants should be estopped from raising the statute of limitations

as a defense because they fraudulently concealed their conduct in dissipating Noetic's funds; and (iii) defendant's conduct constituted a continuing course of conduct, which rendered Hilton's aiding and abetting claim claim timely. The motion also argued that the court erroneously determined the proximate cause element of Noetic's professional negligence claim. The motion was denied on August 17, 2016. Plaintiffs filed their notice of appeal on September 12, 2016.

¶ 21 In this appeal, Hilton challenges the trial court's dismissal of his conversion claim and the summary judgment entered on his aiding and abetting claim.[1] Noetic seeks reversal of summary judgment on its professional negligence claim. Hilton also challenges the trial court's order striking his request for punitive damages.

¶ 22 All of the rulings on the merits of plaintiffs' claims at issue in this appeal call for *de novo* review. See *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 27 (trial court's order dismissing claim pursuant to 2-615 reviewed *de novo*); *Johnson v. Augustinians*, 396 Ill. App. 3d 437, 439 (2009) (*de novo* review applies to ruling that claim was untimely pursuant to motion under 2-619(a)(5)); *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008) (trial court's ruling on summary judgment motion presents an issue of law subject to *de novo* review). We may affirm on any ground appearing in the record, even if not relied on by the trial court. *Vaughn v. City of Carbondale*, 2016 IL 119181, ¶ 44 ("As a reviewing court, this court can sustain the decision of a lower court on any grounds called for in the record, regardless of whether the lower court relied upon those grounds, or whether the lower court's reasoning was correct.").

[1] The notice of appeal also indicated that Hilton was appealing the dismissal of his breach of fiduciary duty claim, but no argument on this issue is contained in Hilton's brief. See Ill. Sup. Ct. Rule 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued are waived").

¶ 23 We will not consider on review arguments plaintiffs first raised in their second motion seeking reconsideration of the court's summary judgment ruling. Although defendants argue that the second motion was procedurally improper because it was a successive postjudgment motion, under the circumstances here, that is not the case. At the time plaintiffs filed their first motion to reconsider, no final judgment had yet been entered given that the consolidated collection matter was still pending. Once final judgment was entered on May 26, 2016, plaintiffs were entitled to file a postjudgment motion. That said, plaintiffs were not entitled to use their postjudgment motion to raise new substantive arguments in opposition to summary judgment and the trial court did not abuse its discretion in denying reconsideration on that basis. See *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36 ("[a]rguments raised for the first time in a motion for reconsideration in the circuit court are forfeited on appeal"); *FHP Tectronics Corp. v. American Home Assurance Co.*, 2016 IL App (1st) 130291, ¶ 34 (where losing party seeks to bring new matters to trial court's attention on reconsideration of challenged order, abuse of discretion is appropriate standard of review); *Muhammed v. Muhammed-Rahmah*, 363 Ill. App. 3d 407, 416 (2006) (same). We will thus limit our discussion of the arguments raised on appeal to those presented to the trial court before its ruling.

¶ 24 We first address the timeliness of Hilton's claims. Under the Code of Civil Procedure, any claim against a lawyer sounding in "tort, contract, or otherwise" and arising out of the rendering of professional services, must be filed within two years of the time the plaintiff "reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3 (West 2010). Even if the claim is brought by a non-client, the two-year limitation applies as long as the claim arises out of the attorney's provision

of legal services. *Riseborough,* 2014 IL 114271, ¶ 23 ("The 'arising out of' language indicates an intent by the legislature that the statute apply to all claims against attorneys concerning their provision of professional services."); *800 South Wells Commercial, LLC v. Horwood Marcus & Berk Chartered*, 2013 IL App (1st) 123660, ¶ 13 (non-client's claim against attorney for aiding and abetting client's breach of fiduciary duty to non-client time-barred because "the plain language of the statute directs that the two-year limitation applies to all claims against an attorney arising out of acts or omissions in the performance of professional services, and not just legal malpractice claims or claims brought against an attorney by a client."). Both of Hilton's individual claims against defendants arise out of defendants' conduct during the course of their representation of Dwyer and Noetic in the underlying litigation. For example, Hilton claims that defendants filed "factually unsupported pleadings" and that the defense of the case was merely a "subterfuge" for accomplishing Dwyer's goal to drain Noetic's assets. Hilton also claims that defendants "converted" Noetic's assets by billing for their services and that they aided Dwyer's breach of fiduciary duty by vigorously defending the underlying litigation. The labels attached to the claim—conversion or aiding and abetting a breach of fiduciary duty—do not alter the basis for defendants' claimed liability: their rendering of professional services to Noetic and Dwyer. Thus, because Hilton's claims arise out of professional services rendered by defendants, we conclude that the two-year statute of limitations applies to Hilton's conversion and aiding and abetting claims.

¶ 25 The question then becomes when Hilton "reasonably should have known of the injury for which damages are sought." The statute begins to run when a plaintiff knows or reasonably should know that he has suffered an injury and that it was wrongfully caused.

Janousek v. Katten Muchin Rosenman LLP, 2015 IL App (1st) 142989, ¶ 13. The point at which the statute of limitations begins to run normally presents an issue of fact inappropriate for resolution on summary judgment. *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 250 (1994); *Blue Water Partners, Inc. v. Mason*, 2012 IL App (1st) 102165, ¶ 48. But when the facts regarding the plaintiff's knowledge of the injury and its wrongful cause are undisputed, the issue of whether a claim is time-barred may be determined as a matter of law. *Guarantee Trust Life Insurance Co. v. Kribbs*, 2016 IL App (1st) 160672, ¶ 27 ("Although '[t]he point at which [an] injured person becomes possessed of sufficient information concerning his injury and its cause to trigger the running of the limitations period is usually a question of fact,' it becomes an issue of law where 'the facts are undisputed and only one conclusion may be drawn from them.' ") (quoting *Janetis v. Christensen*, 200 Ill. App. 3d 581, 586 (1990)); *Janousek*, 2015 IL App (1st) 142989, ¶ 13.

¶ 26 Hilton claims that until he reached the settlement with Dwyer on September 30, 2008, in which she admitted that he was owed a sum certain, his damages were speculative. As a result, he argues that his lawsuit filed against defendants less than two years later on September 3, 2010, was timely.

¶ 27 But the injury for which Hilton sought recovery against defendants is the dissipation of Noetic's assets through the payment of attorney's fees to Foley, a loss made possible by what Hilton believed was defendants' conflicted representation of both Dwyer and Noetic. Hilton knew of that conflict by April 2007 when he discussed it with his lawyer who then raised it in a letter to Sheets. Ellis's letter to Sheets specifically referenced Dwyer's email in which she stated she would rather use Noetic's assets to pay

lawyers than to pay Hilton and expressed Ellis's belief that Dwyer was fighting the accounting to prevent Hilton from recovering anything from Noetic. And Sheets responded that while he did not agree that a conflict existed, the continuation of the litigation was diminishing the funds available to settle the case ("with every motion and amended complaint we are forced to respond to, the available funds for such a settlement decreases."). In other words, Sheets made clear that Noetic's assets were being used to pay Foley's fees. Thus, by April 25, 2007, Hilton knew that monies he claimed he was entitled to as a result of Noetic's dissolution were, in his view, wrongfully being paid to Foley. Under these circumstances, Hilton's claims first filed in September 2010 were time-barred.

¶ 28 This is not a case where Hilton's injury could not be determined until resolution of the underlying litigation. In such cases, the client becomes entangled in litigation with a third party, allegedly as a result of the attorney's negligence. Although the client may be aware of the malpractice, the running of the statute is tolled because until resolution of the underlying case, the client does not know whether, in fact, it has been damaged as a result of the attorney's performance. See, *e.g., Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill. App. 3d 349, 355 (1998) ("Since it is also possible the former client will prevail when sued by a third party, damages are entirely speculative until a judgment is entered against the former client or he is forced to settle. When uncertainty exists as to the very fact of damages, as opposed to the amount of damages, damages are speculative [citation], and no cause of action for malpractice can be said to exist."); see also *Romano v. Morrisroe,* 326 Ill. App. 3d 26, 32 (2001) (until insurance carrier took position that demand for arbitration was untimely, there was no injury as the carrier could have waived

the policy limitations period). But here, because Hilton undoubtedly knew that Noetic's funds were being used to pay Foley, it was only the extent of Hilton's injury and not the fact of injury that was uncertain. See *Blue Water Partners, Inc.*, 2012 IL App (1st) 102165, ¶ 65 (citing *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 307 (2005) ("Damages are considered to be speculative *** only if their existence itself is uncertain, not if the amount is uncertain or yet to be fully determined.")). Thus, Hilton's settlement with Dwyer had no effect on Hilton's knowledge of his injury or that it was, in his view, wrongfully caused.

¶ 29 Given our determination that Hilton's conversion and aiding and abetting claims were time-barred, we need not address the alternative grounds upon which the trial court resolved those claims.

¶ 30 Noetic's professional negligence claim presents a different issue. As in any other negligence action, an attorney malpractice plaintiff must establish a proximate relationship between the attorney's negligence and the claimed loss. *Mauer v. Rubin*, 401 Ill. App. 3d 630, 646-47 (2010) (plaintiff could not recover for alleged legal malpractice where he failed to plead facts that would show his attorney's actions were a proximate cause of his injury). "The issue of proximate causation in a legal malpractice setting is generally considered a factual issue to be decided by the trier of fact." (Internal quotation marks omitted.) *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 210 (2006). But, as in the case of determining when the statute of limitations begins to run, if the undisputed facts point to but one conclusion, this issue may be determined on summary judgment. *Wilson v. Bell Fuels, Inc.*, 214 Ill. App. 3d 868, 873 (1991) ("Proximate cause becomes an issue of law *** when the material facts are undisputed

and there can be no difference in judgment of reasonable [persons] as to the inferences to be drawn from them.").

¶ 31 Noetic claims it was injured by defendants' conduct in accepting the representation of both Dwyer and Noetic, which allowed Dwyer to dissipate Noetic's assets by using them to pay Foley. But Noetic adduced no evidence that had Foley declined to represent Dwyer and Noetic in the underlying case, Dwyer would have refrained from hiring counsel and instead distributed Noetic's assets to herself and Hilton. Dwyer was never deposed during discovery in this case and she provided no affidavit in opposition to defendants' argument on proximate cause. And given Dwyer's stated purpose at the outset of the dispute ("I would rather spend the money on legal fees than see [Hilton] get the money"), there is no basis to presume that if Foley had not agreed to represent Dwyer and Noetic, Dwyer would not have been able to secure other counsel who would. Further, whether Dwyer retained other counsel to represent both her and Noetic or whether she hired separate counsel for herself and the LLC, Dwyer, as the managing member of the entity, had the ability to use Noetic's funds to pay counsel to defend Hilton's lawsuit. Thus, given these undisputed facts, it cannot be said that defendants' conduct proximately caused Noetic's loss and the trial court properly granted summary judgment in favor of defendants.

¶ 32 Because we conclude that the trial court properly ruled in defendants' favor on Hilton's and Noetic's claims, we need not consider whether the court also properly granted defendants' motion to strike Hilton's prayer for punitive damages.

¶ 33 Affirmed.